AGENDA DOCUMENT #96-27-B

SUBMITTED LATE
AGENDA ITEM
For Meeting of: MAR 7 1996

FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 6, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

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Associate General Counsel

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SUBJECT: Supplement to AOR 1996-4

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On February 29, 1996, this office received a letter from counsel for Lyndon H. LaRouche, Jr., the requester in AOR 1996-4. Counsel sent this letter after reading this office's draft response to the request, which is presently on the agenda for March 7, 1996 (Agenda Document #96-27). In the letter, counsel primarily seeks to clarify his concerns with respect to the third question in his request, which was directed to the method of assuring the lending bank that its bridge loan to the campaign would be repaid when delayed Treasury payments of previously certified matching funds were eventually made.

Counsel is concerned with language in the regulations at 11 CFR 9034.4(a)(3)(ii). This regulation is cited in the Agenda Draft (bottom of page 6 and the top of page 7) in a discussion of the use of loan proceeds from a loan received prior to the date of ineligibility ("DOI") and its effect on matchability. The regulation also addresses the use of contributions received after the date of ineligibility stating that they may be used to continue to campaign and may be submitted for matching fund payments. Counsel is concerned as to the implications of the subsequent sentence which provides: "The candidate shall be entitled to receive the same proportion of matching funds to defray net

outstanding campaign obligations as the candidate received before his or her date of ineligibility."

Counsel expresses the concern that this ratio would be applied not just to new submissions of contributions for matching after DOI, but also to the late payments by the Treasury of amounts certified prior to the date of ineligibility. In other words, instead of receiving late payments to the extent of the net outstanding campaign obligations ("NOCO"), the candidate would receive only a proportion of that amount. Counsel presents an example using, in part, the figures in the agenda draft's illustration (page 6, lines 9-15) of the application of the regulations pertaining to a shortfall. He uses the ratio applicable to the computation of a repayment obligation set out at 11 CFR 9038.2(b)(2)(iii), i.e., the ratio of the amount of matching funds certified (in this case, pre-DOI) to the total of matching funds plus private contributions. He expresses concern that if the ratio were 25 percent, and this was applied to the NOCO amount, then the matching payment disbursement would not be $75,000, but one-quarter of that amount, i.e., $18,750. Also noteworthy in his example is his hypothetical amount of unpaid matching funds ($200,000) and his inclusion of that amount as an asset in the NOCO statement.

This office interprets the reference in 11 CFR 9034.4(a)(3)(ii) to the "same proportion" as inapplicable to matching payment entitlement already certified pre-DOI. Instead, the context shows an intended reference to the matchability of contributions submitted for Commission review after DOI. In the Explanation and Justification of this regulation, the Commission applies this proportion specifically in the context of post-ineligibility contributions, and not elsewhere in the discussion, as follows:

> The Commission has now revised §9034.4(a)(3)(ii) to allow a candidate to use post-ineligibility contributions to continue campaigning after the date of ineligibility without such activity resulting in a repayment of funds in excess of entitlement or a repayment of funds used for nonqualified campaign expenses. Compare new 11 CFR 9038.2(b)(2)(ii)(D). Under the new approach, the candidate's NOCO is "frozen" as of the candidate's date of ineligibility. Contributions received after the date of ineligibility that are used to continue to campaign may be submitted for matching. The candidate may continue to receive the same proportion of matching funds to defray NOCO as the candidate received before the date of ineligibility.

56 Fed. Reg. 35905 (July 29, 1991).[1] This office, therefore, believes that the payments of matching funds certified prior to DOI, but not paid, will be limited to the NOCO amount, pursuant to 11 CFR 9036.4(c)(2), but will not be further limited by the application of a

[1] The paragraph continues with a discussion of the other consequences of the use of post-ineligibility matching fund payments.

ratio. Such a ratio may be used, however, to determine the candidate's entitlement as to matching fund submissions made after DOI.

With respect to counsel's characterization of the withheld Treasury payments (on pre-DOI certifications) as assets, this office concurs with the view of the Audit Division that the withheld matching funds would not properly be treated as an asset on the NOCO statement submitted after DOI. The contingent nature of amounts not paid by Treasury on pre-DOI certifications is inherent with the shortfall circumstances. It is at least conceptually possible (although most unlikely given the most recent projections) that sufficient monies would not become available to cover all of the shortfall. Furthermore, as Commission regulations indicate, the impact of the Treasury shortfall may result in Commission revisions to its previous certfications. 11 CFR 9036.4(c)(2), *see* 11 CFR 9034.5(a)(2)(iii). Assuming the Treasury shortfalls can be covered as check-off proceeds from 1995 Federal income tax returns are received, the amount of future payments on pre-DOI certifications would depend on the NOCO statement balance and not on amounts previously certified by the Commission, but unpaid by Treasury.

Based on the foregoing, this office proposes to amend the agenda draft to respond to the concerns expressed by the requester's counsel. One amendment would be a footnote stating counsel's principal concern and explaining that the language in 11 CFR 9034.4(a)(3)(ii) referring to the "same proportion" does not apply to matching payments certified before DOI but not paid. Another amendment would explain that the NOCO statement should not include the withheld matching payments as an asset.

Recommendation

Approve the conclusions stated in Agenda Document #96-27 (as amended by Agenda Document #96-27-A) and in this memorandum, subject to circulation of a final revised draft for tally voting which contains the revisions discussed above.